State of Florida

General Counsel
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Public Service Commission

September 18, 1996

BY FEDERAL EXPRESS

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CC Docket No. 96-98 - Implementation of the Local Competition Provisions in the Telecommunications Act of 1996.

Dear Mr. Caton:

These are the original documents of what was filed September 18, 1996, with the FCC.

Sincerely,

Robert D. Vandiver
General Counsel

RDV/jb
Enclosure
cc: Michael E. Gans, Clerk
8th Circuit

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Re: CC Docket No. 96-98 - Implementation of the Local Competition Provisions in the Telecommunications Act of 1996.

Dear Mr. Caton:

Enclosed are the original and twelve (12) copies of the Florida Public Service Commission's Motion for Stay in the above-captioned matter.

Please acknowledge receipt by affixing an appropriate notation on the copy of FPSC Motion for Stay furnished for such purpose and remit same to the bearer in the enclosed self-addressed stamped envelope.

Sincerely,

Robert D. Vandiver
General Counsel

RDV/jb
Enclosure
cc: Michael E. Gans, Clerk
8th Circuit

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

MOTION FOR A STAY PENDING JUDICIAL REVIEW

ROBERT D. VANDIVER
General Counsel
FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(904) 413-6248

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

MOTION OF THE FLORIDA PUBLIC SERVICE COMMISSION FOR STAY PENDING JUDICIAL REVIEW

Comes now, Petitioner, the Florida Public Service Commission (FPSC), to seek a stay of the Federal Communications Commission (FCC or Commission) First Report and Order of August 8, 1996 (Order). In support of such petition, the FPSC alleges as follows:

INTRODUCTION AND SUMMARY

The new pro-competitive telecommunications framework is working in Florida. Parties in Florida have negotiated and filed agreements for local interconnection and competition. The first local service competitor filed for authority June 30, 1995. As of September 12, 1996, 38 providers are authorized to provide competitive basic local exchange telecommunications services. One or more of the four largest local exchange companies, representing over 98% of Florida's access lines, have interconnection agreements with 14 competitive local exchange companies. Florida's act[1] is similar in philosophy to the Federal Telecommunications Act of

[1] Chapter 95-403, Laws of Florida; codified in Chapter 364, Florida Statutes, 1995. The Legislative chapter law appears as Appendix II. Reference to the law will appear as "Florida law" or "Florida act" at __; cross-referenced to Florida Statutes, 1995.

1996.[2] The Florida Act predates the Federal Act by some seven months. The Florida Public Service Commission has been actively implementing the Florida law since the effective date of July 1, 1995.[3] The FPSC has been implementing local competition under federal law since February 8, 1996.[4] (Affidavit of Richard Tudor at Appendix V).

The new Florida telecommunications law passed the Florida Legislature on May 5, 1995. Although the Florida Act predated the Federal Act by over seven months, the two laws are very similar in approach and philosophy.[5] Both acts have parties negotiating initially, followed by State commission resolution of any outstanding issues.[6] Both acts embrace telecommunications

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[2] P.L. 104-104, 104th Congress 1995. The Telecommunications Act of 1996 appears as Appendix I. For the Commission's convenience, all cites to this law will reference the "Federal Act" at §_____, as well as the parallel cross-referenced citation to 47 U.S.C..

[3] Certain portions of Chapter 95-403, Laws of Florida took effect July 1, 1995 and some portions January 1, 1996. The Florida law appears as Appendix II.

[4] President Clinton signed the Congressional bill into law on that date.

[5] This fact appears beyond doubt: "The goal of both the Florida and Federal law is the same - to provide customers with the new choices, that fair competition, lower prices and advanced technologies will bring to the local telecommunications market." MCI's Petition for Arbitration under the Telecommunications Act of 1996, filed August 26, 1996 in FPSC Docket No. 960980-TP, at page 4.

[6] Section 252(a)-(e), Federal Act; 47 U.S.C. § 252(a)-(e). Florida Act at Section 14; § 364.16(2), Florida Statutes 1995.

competition as the guiding principle.[7] Both acts have provisions relating to universal service.[8] Some procedural time lines vary between the two acts. The principal substantive difference lies in the Florida Act provision that resale not be below cost.[9]

The FPSC will show that the FCC, through its intrastate pricing mandates and other directives on intrastate matters, has ignored 47 U.S.C. § 152[10] and assumed more authority than Congress provided in reference to Sections 251 and 252 of the Federal Act. The FPSC recognizes that some areas of the law are subject to explicit and exclusive Federal jurisdiction. In the area of number portability,[11] for example, the FPSC position was established by a hearing held October 20-21, 1995 (Docket No. 950737-TP). The parties had stipulated many of the issues, and the FPSC adjudicated the remainder as discussed above pursuant to Florida Law. The Federal Act expressly grants the FCC the power to establish number

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[7] See §§ 251, 252 and 253 of the Federal Act. 47 U.S.C. §§ 251, 252, 253. Florida Act at Section 5; § 364.01(3), Florida Statutes, 1995.

[8] Section 254, Federal Act, 47 U.S.C. § 254; Florida Act at Section 7; § 364.025, Florida Statutes, 1995.

[9] Florida Act at Section 14; § 364.16(3), Florida Statutes, 1995.

[10] 47 U.S.C. § 152(b); Section (2)(b) of the Communications Act of 1934, as amended. This statute appears as Appendix III.

[11] Number portability refers to the ability of a telephone customer to retain her original telephone number when she changes local companies. Florida Act at Subsection 364.16(4), Florida Statutes.

portability standards. The FPSC is currently reviewing its earlier number portability decision to determine its compliance with the federal decision. See Section 251(b)(2), Federal Act. The point here is simply that the FPSC clearly recognizes that some areas were placed within the jurisdiction of the FCC.[12] The FPSC is not challenging the underlying constitutionality of the Act[13] but rather the FCC's interpretation of the Act. Such interpretation exceeds the authority granted the FCC by Congress. See Section 152(b), Appendix III.

The FPSC will also demonstrate arbitrary and capricious FCC action through improper market signals and substituting theory for proof, thus making no economic (or otherwise) sense. The FCC rules are anticompetitive in certain respects. Irreparable harm to Florida ratepayers will result if a stay is not granted. Other parties will not be adversely affected by a stay in that implementation of Florida and Federal law is proceeding apace in Florida. The public interest favors a stay to address serious legal issues.

In addition, given the immediacy and magnitude of the harm that the movants will suffer if the rules go into effect, the movants request that the Commission act on this motion within 1

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[12] Other examples of exclusive federal jurisdiction include Section 253(d), Removal of barriers to entry; Section 276(c), Payphones; Section 251(e)(1); North American Numbering Plan.

[13] See Section 561, Federal Act, 47 U.S.C. § 561.

day.[14] If the Commission has not acted within that time the FPSC intends to seek a stay from the Court of Appeals.

ARGUMENT

1) The Court enumerated four factors favoring the granting of a stay in Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977). These factors are:

a. **Has the petitioner made a strong showing that it is likely to prevail on the merits of the appeal?**

b. **Has the petitioner shown that without such relief, it will be irreparably injured?**

c. **Would the issuance of a stay substantially harm other parties interested in the proceedings?**

d. **Where lies the public interest?**

[14] This accelerated schedule will allow the FPSC to efficiently file in federal court and has been discussed with FCC.

a. **Has the petitioner made a strong showing that it is likely to prevail on the merits of the appeal?**

1. **Petitioner is likely to prevail based on the plain meaning of the Statute and Legislative History**

The FCC's Order addresses Sections 251 and 252 of the Act. The FPSC respectfully submits that the plain language of these sections, when considered in pari materia with other sections of the Act, particularly Section 601(c)(1), demonstrates conclusively that the FCC is acting beyond the scope of authority delegated by Congress. In support of its position, the FPSC adopts the argument contained in the Joint Motion of GTE Corporation and the Southern New England Telephone Company for Stay Pending Judicial Review, Section I.A., from the last paragraph on page 6 through the first paragraph on page 12. The FPSC asserts that this reading of the statute comports with Congressional intent.

Congress, as demonstrated by the statutory language cited at note 12 above, was clear when it intended to preempt States. And, it was equally clear that there was to be no implied preemption:

> (1) NO IMPLIED EFFECT. - This Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State, or local law unless expressly so provided in such Act or amendments. Section 601(c)(1), Federal Act; 47 U.S.C. § 601(c)(1).

The Congressional scheme is one under which the states do most of the heavy lifting (e.g. decision-making as discussed below in d.1) and the FCC has other specified and even preemptive duties.

See especially Section 253(d), Federal Act, 47 U.S.C. § 253(d). The FCC action here turns the statute on its head. Federal preemption is claimed by the FCC in the Order based on a tenuous thread of implied authority. See Paragraphs 83-103. This alone is enough to demonstrate likelihood of success on the merits.

The FCC interprets the 1996 Act as one that "moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act, and instead expands the applicability of national rules to historically intrastate issues, and state rules to historically interstate issues." (Order at ¶24). Yet this interpretation is at odds with the plain language of the statute, which states, in Section 152(b), (47 U.S.C. § 152(b), "(n)othing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." This statute appears as Appendix III.

At paragraphs 83-103, the FCC attempts to cobble together a rationale to read Section 152(b) out of the Federal Act. Despite Section 152(b) and the case law thereon,[15] in the face of Congressional language prohibiting implied preemption (See Section 601(c)(1) cited above) and the explicit Congressional preservation

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[15] Louisiana Public Service Commission v. FCC, 476 U.S. 353, 90 L. Ed. 2d 369, 106 S. Ct. 1890 (1986).

of state authority in Sections 251 and 252,[16] the FCC decides that it will imply a preemptive approach. The rationale is strained, result-oriented and totally at odds with the statutory scheme. If Congress wanted the result chosen by the FCC,[17] Section 152(b) would not appear in the act and there would be an express rather than implied preemption. It appears the FCC is taking it upon itself to re-write the law. However, only Congress may do that.

In the Order's section on "Scope of the Commission Rules," the FCC states, "we adopt national rules where they ... offer uniform interpretation of the law that might not otherwise emerge until after years of litigation ... Over time, we will continue to review the allocation of responsibilities, and we will reallocate them if it appears that we have inappropriately or inefficiently designated the decisionmaking role." (Order at ¶41). The FCC has no authority to "reallocate" the Federal-state roles.

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[16] 47 U.S.C. § 251(d)(3), § 251(d)(3); 47 U.S.C. § 252(e)(3), § 252(e)(3); 47 U.S.C. 252(f), § 252(f); 47 U.S.C. 252(g), § 252(g). Each of these provisions explicitly preserves State authority in Sections 251 and 252. See also 47 U.S.C. § 253(b), § 253(b); 47 U.S.C. § 254(f), § 254(f) and 47 U.S.C. § 261, § 261.

[17] Probably the only portion of the self-serving analysis that warrants a reply concerns the FCC claim that Section 261(c), by providing that "State requirements are not inconsistent with this part or the Commission's regulations to implement this part" somehow means every State action must be identical to what the FCC promulgates. Order at ¶98-101. The FPSC submits that "not inconsistent with" does not automatically mean "identical to." Rather the FPSC posits that the terms are not interchangeable. See also Section 251(d)(3) which does not require consistency with FCC rules on interconnection, and Section 601(c) which does not allow implied preemption.

The FCC concludes that, in enacting Sections 251, 252 and 253, Congress created a regulatory system that differs significantly from the dual regulatory system it established in the 1934 Act. The FCC "holds" that Section 251 authorizes the FCC to establish regulations regarding both interstate and intrastate aspects of interconnection, services, and access to unbundled elements. It also "holds" that the regulations the Commission establishes pursuant to Section 251 are binding upon states and carriers and that Section 152(b) does not limit the Commission's authority to establish regulations governing intrastate matters pursuant to Section 251. (Order at ¶84).

"Similarly," states the Order, "we find that the states' authority pursuant to Section 252 also extends to both interstate and intrastate matters":

> Although we recognize that these sections do not contain an explicit grant of intrastate authority to the Commission or of interstate authority to the states, we nonetheless find this interpretation is the only reasonable way to reconcile various provisions of Sections 251 and 252, and the statute as a whole. As we indicated in the NPRM, it would make little sense in terms of economics or technology to distinguish between interstate and intrastate components for the purposes of Sections 251 and 252. (emphasis added) (Order at ¶84).

The FCC looks to the fact that the Commission is required to assume the state commission's responsibilities when a state fails to act as giving rise to "the inevitable inference that both the states and the FCC are to address the same matters through their parallel jurisdiction over both interstate and intrastate matters under Sections 251 and 252." (Order at ¶85). Yet the federal Act

tells the FCC that it cannot look for any "implied authority" in the Act. Section 601(c) cited above.

The FCC's rationale is weak. "If these sections are read to address only interstate services, the grant of substantial responsibilities to the states under Section 252 is incongruous. A statute designed to develop a national policy framework to promote local competition cannot reasonably be read to reduce significantly the FCC's traditional jurisdiction over interstate matters by delegating enforcement responsibilities to the States, unless Congress intended also to implement its national policies by enhancing our authority to encompass rulemaking authority over intrastate interconnection matters." On the contrary, the national framework created by Congress was one that set the standards for the companies to follow, with lighter-handed regulation from the FCC and the States.

The FCC's actions here appear particularly cynical from the State perspective. The various State commissions, collectively through the National Association of Regulatory Utility Commissioners, and States individually such as New York and Florida, were actively involved in the development of the legislation. The fundamental tenet of the State position was to retain Section 152(b) of the Act. At one point in the evolution of the legislation, that section had been removed from the Act. Yet, Congress reinserted Section 152(b) and it remained as part of the law. Simply and bluntly, the State commissions and other interests

in support of retaining Section 152(b) won and the FCC and other interests lost. Now, incredibly, the FCC seeks to accomplish administratively what it failed to do in Congress - eliminate Section 152(b) from the Telecommunications Act of 1996. The apparently cynical attempt to now "interpret" the Act to accomplish the same end is not only strained and disingenuous, it is contrary to law.

When Congress retains a statute in an act which otherwise substantially revises the law, it is presumed that Congress knew the Supreme Court case law on that statute.[18] Southerland, Statutory Construction, 6th Ed. Vol. 2A (1992) at p. 62. See also Apex Hosiery Co. v. Leader, 310 U.S. 469, at 488-89 (1940). Therefore, the "dual regulatory regime" discussed by the Court in Louisiana PSC v. FCC, 476 US 335 (1986) remains viable despite the FCC's latest attempt to recreate our jurisdictional world with its

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[18] It is well established that "where Congress includes limiting language in an earlier version of a bill, but deletes it prior to enactment, it may be presumed that the limitation was not intended." Russello v. United States, 464 U.S. 16, 23-24 (1984). The FCC nonetheless contends that the presumption does not apply where, as here, Congress offers no explanation of the basis for the deletion. The cases cited by the Commission do not support its assertion. At most, they stand for the proposition that an unexplained legislative deletion is entitled to little weight where it conflicts with "the plain language and clear structure" of the statute in question. Mead v. Tilley, 490 U.S. 714, 723 (1989). See also Rastelli v. Warden, 782 F.2d 17, 24 & n. 3 (2d Cir. 1986); Drummond Coal Co. v. Watt, 735 F.2d 469, 473-74 (11th Cir. 1984). That circumstance is absent here. To the contrary, the language and structure of the Act conform with the inference suggested by the deletion.

"parallel jurisdiction" theory. See Order at ¶85. There the FCC opines that this 'new' scheme gives states powers over some interstate matters.

The FPSC respectfully submits that the "gift" of interstate jurisdiction is not the FCC's to grant. The retention of Section 152(b) also forbids the FCC from doing what it has done here - usurping state authority without express authority as required by the Act itself. See Section 601(c)(1).

The FCC acknowledges that the Act authorizes the "States to set prices for interconnection and unbundled elements that are cost-based, nondiscriminatory, and may include a reasonable profit." Yet it inserts itself into the state domain, by offering, "To help the states accomplish this, the Commission concludes that the states should set arbitrated rates for interconnection and access to unbundled elements pursuant to a forward-looking economic cost pricing methodology." (Order at ¶29). In this "helping" role, the FCC then mandates that states use a certain pricing methodology. The Order states, "We also recognize, however, that in at least some instances existing state requirements will not be consistent with the statute and our implementing rules. It will be necessary in those instances for the subject states to amend their rules and later their decisions to conform to our rules." What starts out as a "helping" role is turned into a preemptive directive to states.

This mandatory pricing methodology over intrastate matters flies in the face of the 1996 Act. While Section 251(d)(1) gives the FCC the authority to establish rules to implement the section, Section 251(d)(3) on Preservation of State Access Regulations, provides:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission (FCC) shall not preclude the enforcement of any regulatory order, or policy of a State commission that --
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Note that it does not add "is consistent with Commission (FCC) regulations." That omission demonstrates that Congress did not mean for the states to have to follow FCC rules relating to intrastate pricing of interconnection. This conclusion is supported by the Joint Explanatory Statement.

The Joint Explanatory Statement of the Committee of Conference notes that the Senate amendment which was <u>not adopted</u> contained:

> New subsection 251(j) provides that nothing in section 251 precludes a State from imposing requirements on telecommunications carriers with respect to intrastate services that the State determines are necessary to further competition in the provision of telephone exchange service or exchange access service, <u>so long as any such requirements are not inconsistent with the Commission's rules to implement section 251.</u> (emphasis added)

The Conference agreement adopted a "new model for interconnection that incorporates provisions from both the Senate bill and House amendment." It notes, "New Section 251(d) requires the Commission to adopt regulations to implement new Section 251 within 6 months, and states that nothing precludes the enforcement of State regulations that are consistent with the requirements of section 251." (emphasis added) Note that it omitted the language "consistent with the Commission's rules." See 601(c) Federal Act, 47 U.S.C. 601(c).

In summary, the FCC is attempting to make an argument that Section 251 should be read to expand the FCC's jurisdiction on the theory that uniform national rules are needed. This argument simply cannot be made. This is precisely the argument the FCC made -- and the Supreme Court struck down -- in Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 90 L. Ed. 2d 369, 106 S.Ct. 1890 (1986). And, it too addressed Section 152(b)! The Supreme Court rejected the FCC's argument as the means for evading the jurisdictional constraint of Section 152(b) since it would, in effect, permit the FCC to "confer power upon itself." The Supreme Court stated:

> To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant the agency power to override Congress. This we are both unwilling and unable to do. 476 U.S. 375.

Indeed, the Supreme Court stated that Section 152(b) constitutes a "congressional denial of power to the FCC." 476 U.S.

374. It is all the more striking that the FCC refers to Congress' retention of Section 152(b) as nonsubstantive. See Order at ¶95.

The most egregious error the Order makes on legislative intent is, "We conclude that elimination of the proposed amendment of Section 152(b) was a nonsubstantive change because, as AT&T contends, such amendment was unnecessary in light of the grants of authority under Sections 251 and 252, and would have had no practical effect." (Order at ¶95). This was a hard-fought battle: not a nonsubstantive change.

2. The Federal Communications Commission action is arbitrary and capricious.

Other examples of reversible error are clearly evident in the FCC document, even granting Chevron deference.[19] The pricing directives in the FCC's order are far more prescriptive than called for by the Act and have the effect of precluding use of the best information that may be available to a State commission. This

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[19] Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). The FPSC believes the FCC interpretation is not entitled to deference. In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole. National R.R. Passenger Corp. v. Boston & Main Corp., 503 U.S. 407, 417 (1992). That "structure and language" establishes that the FCC has overstepped its bounds by prescribing detailed regulations of the terms and conditions of intrastate services. As such, the agency's interpretation is not entitled to deference. MCI Telecommunications Corp. v. FCC, 114 S. Ct. 2223, 2231 (1994) (An agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear.)

result is directly counter to Section 252(b)(4) of the Act.[20] In particular, the FPSC has serious concerns with the proxy rate for loops and the geographic deaveraging requirement for interconnection and unbundled elements.

With respect to loops, the proxy rate of $13.68 for Florida, which is to be used in the absence of a Total Element Long-Run Incremental Cost (TELRIC) study, is substantially lower than the $20 rate which the FPSC set for GTE based on a Total Service Long-Run Incremental Cost (TSLRIC) estimate. The FPSC believes a TELRIC study differs from a TSLRIC study in two respects. A TELRIC study includes an allocation of joint and common costs and excludes the avoidable costs of selling at wholesale rather than retail. It appears the net effect of these differences should be that TELRIC exceeds TSLRIC. Consequently, the FPSC firmly believes that a state-specific TSLRIC estimate, supported by a sworn evidentiary record, can reliably serve as a price floor. This approach would be far superior to using the FCC's proxy rate which may bear no relationship to the actual cost of providing loops in a particular state. Moreover, for Florida, the proxy rate is arbitrarily low and sends the wrong economic signals to the marketplace. Firms may enter the market based on the artificially low proxy rates and, in turn, be forced to exit once higher, TELRIC-based rates are established. The industry and consumers should not be subjected to

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[20] 47 U.S.C. § 252 (b)(4).

these regulatory shocks when a better, less disruptive approach can be taken. The Commission's approach is manifestly arbitrary and thus violative of 5 U.S.C. § 706(2)(A). The adverse effect on competition and consumers is both immediate and long-term.

Regarding the geographic deaveraging requirement for interconnection and unbundled elements, such a requirement may be logical for loops; however, the FCC's order is far too sweeping and produces very questionable results. While the FPSC recognizes the merits of zone specific pricing where supported by cost characteristics, the costs of providing interconnection and many unbundled elements do not materially vary by locale. This is another case of sending the wrong economic signals to the marketplace. Dense, urban areas are intrinsically attractive to entrants since lucrative business customers tend to be located there. Deaveraging tips the scales even further towards encouraging competition in urban areas by lowering the cost of entry, without ample economic justification. This will further discourage entry in rural and suburban areas and reduce the rate at which competition will expand out from the urban core.[21] This FCC-directed lopsided development of competition is not beneficial to the protection of the public welfare. This too is arbitrary and capricious, as such violative of 5 U.S.C. 706(2)(A).

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[21] See Affidavit of Walter D'Haeseleer at Attachment IV.

Moreover, the Commission's rules, while offered in support of competition, are themselves highly anticompetitive. As elsewhere demonstrated in this Motion, the Commission, while acknowledging its lack of explicit authority therefore, has appointed itself a volunteer in the regulation of intrastate matters which are specifically reserved to the States. Where Congress in the 1996 Telecommunications Act envisioned action by the Commission in certain areas only when state commissions failed to act,[22] the Commission would sweep away that limitation on the grounds that

> A statute designed to develop a national policy framework to promote local competition cannot reasonably be read to reduce significantly the FCC's traditional jurisdiction over interstate matters by delegating enforcement responsibilities to the states, unless Congress intended also to implement its national policies by enhancing our authority to encompass rulemaking authority over intrastate interconnection matters.

First Report and Order, ¶93-95. This is an illogical conclusion. The very essence of a deregulation provision is that it reasonably can be expected to reduce the presence in these markets of both federal and State regulation. The last thing that one could "reasonably" expect is that the Commission's "traditional jurisdiction" will be maintained and that deregulation would result in "enhancing [the Commission's] authority." In any event, while the Commission can choose to seek more authority from Congress, it

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[22] See Section 252(e)(5), Federal Act, 47 U.S.C. § 252(e)(5).

cannot embark on a spree preempting explicitly granted State authority based on the premise presented above.

The premise that Congress' deregulatory statute can be interpreted paradoxically to imply a greater regulatory role for the Commission than Congress actually granted to it is a thematic flaw. Thus, the Commission seeks to "help" the states implement competition by requiring national adherence to proxy prices within a defined range or subject to a ceiling, and by establishing national pricing for interconnection and unbundled elements set at a specific formula (TELRIC). First Report and Order, ¶22, ¶672.

However, such interference with pricing has long been condemned as the very archetype of anticompetitive conduct:

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interferences. [emphasis added]

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).

Though the Commission may assume that those market participants adhering to the Commission's anticompetitive price ceilings and pricing formulas will be immune from the Sherman Act, the usual bases for that assumption are absent in this case. For one thing, the Commission itself admits that the authority for these rules is only implied, not explicit. Yet, implied repeal of

the Sherman Act is strongly disfavored. Otter Tail Power Co. v. United States, 410 U.S. 366, 372-375 (1973) (quoting from United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-52 (1963). As stated in Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963), "Repeal [of the antitrust laws] is to be regarded as implied only if necessary to make the [regulatory scheme] work and even then only to the minimum extent necessary." Indeed, Congress has provided an explicit savings clause in the 1996 Telecommunications Act preserving the applicability of the antitrust laws in these markets. Section 601(b)(1).

In this instance, trying to meet the Silver standard would certainly be a daunting task. One would have to show that anticompetitive interferences with "the free play of market forces" by means of nationally agreed price ceilings and pricing formulas were not merely helpful to the states, but "necessary to make the regulatory scheme work", where the "regulatory" scheme at issue was the introduction of competition itself and the trade restraints were not explicitly authorized.[23] Moreover, these anticompetitive interferences would have to be demonstrated, even then, to be only to the minimum extent necessary. In marked contrast, market interferences by either the states or the Commission which are pursuant to explicitly granted authority raise none of these concerns. In the FPSC's view, the Commission errs as a matter of

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[23] Because of the lack of statutory authority, the FPSC believes these rules to be ultra vires.

law and policy by treating the transition to competition as merely another regulatory program rather than as the deregulatory and devolutionary process that Congress mandated.

The anticompetitive nature of the Commission's interferences with pricing is plainly apparent. It is per se unlawful for competitors to agree to adhere to maximum prices, (i.e., price ceilings) regardless of the potential consumer benefits of such arrangements. Arizona v. Maricopa County Medical Socy, 457 U.S. 332 (1982). Similarly, agreements to adhere to specified pricing formulas are also per se illegal. FTC v. Cement Inst, 333 U.S. 683, 720-2 (1948) (agreement among competitors to use multiple-basing point pricing system).

Indeed, overlooked within the Commission's rationales is a sufficient regard for the premise of competition itself:

> . . . [t]he unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress. . . . [emphasis added]

Northern Pac. Ry v. United States, 356 U.S. 1, 4 (1958).

While, admittedly, Congress did not, in the 1996 Telecommunications Act, move to a wholly unrestrained interaction of competitive forces in these previously extensively regulated markets, it struck a balance by explicitly providing for those interferences by state and federal regulators it believed would be necessary and helpful to achieve the transition to competition. In

its First Rule and Order, the Commission has misconstrued this as an opportunity to impose by unauthorized fiat what it believes the results of competition would or should be if only markets were as wise as FCC regulators. This is inconsistent with either the "unrestrained interaction of competitive forces" or the partially regulated transition explicitly provided for in the 1996 Telecommunications Act.

These interferences with telecommunications markets are unauthorized as a matter of regulatory law and anticompetitive. The Commission's sincerity cannot substitute for a lack of statutory authority nor can its good intentions justify gratuitous market interferences. Congress has explicitly provided the means to open local markets. Where those authorized means are just now being tried, and have certainly not yet failed, the Commission's attempt to volunteer new, unauthorized and anticompetitive command and control market restraints is unjustified and must be stayed. Because of the irreparable harm to the ongoing competitive process that the anticompetitive pricing provisions within the First Report and Order will cause, unless stayed, the FCC's action, far from helping the transition to competition, looms as a major obstacle to it.